

1 J. Stephen Werts, OSB No. 74337  
email address: swerts@chbh.com  
2 CABLE HUSTON BENEDICT HAAGENSEN & LLOYD LLP  
Suite 2000, 1001 SW Fifth Avenue  
3 Portland, OR 97204-1136  
Telephone: (503) 224-3092  
4 Facsimile: (503) 224-3176

5 Of Attorneys for Kenneth W. Perry and Roberta A. Kale  
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8 UNITED STATES BANKRUPTCY COURT  
9 FOR THE DISTRICT OF OREGON

10 **In re**

11 **GKPS, INC.,**

12 **Debtor.**

**Case No. 04-34670-tmb7**

**KENNETH W. PERRY'S AND ROBERTA  
A. KALE'S OPPOSITION TO MOTION  
FOR SUBSTANTIVE CONSOLIDATION**

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14 Kenneth W. Perry ("Perry") and Roberta A. Kale ("Kale") submit this opposition to the  
15 trustees' motion for substantive consolidation under 11 U.S.C. § 105(a). Perry also joins in any  
16 other opposition to the trustee's motion.

17 **INTRODUCTION**

18 The trustee of GKPS, Inc., Amy Mitchell, ("GKPS"), and the trustee Symphony  
19 Healthcare V, ("Symphony V"), Rodolfo A. Camacho, seek to substantively consolidate the  
20 GKPS estate with the Symphony V estate, and with the non-debtor entity Symphony III, Inc., an  
21 inactive Tennessee corporation, and the non-debtor entity Hospital and Surgical Center  
22 Management Services, L.P., a Nevada limited partnership ("HSC"), which the trustees define  
23 collectively as the "Symphony Entities." Both trustees have asked this Court for an orders  
24 substantively consolidating all of the Symphony Entities into a single estate, *nunc pro tunc* to  
25 March 23, 2004, with an express preservation of any and all claims which the trustees believe  
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1 may be held by any single entity against either Perry or Kale (and against their former associates  
2 Sudhir P. Srivastava and Suresh N. Gadasalli).

### 3 **ARGUMENT**

4 GKPS, Symphony V and HSC are duly formed, legally separate and distinct entities, and  
5 were not all formed in the same states. Symphony I, Symphony II, Symphony IV and Symphony  
6 V have already been consolidated to become the Symphony Debtor. The “facts”, upon which the  
7 trustees rely, are not legally sufficient to support an order of consolidation, even if proved in an  
8 evidentiary hearing, and certainly not based upon oral argument only. The time scheduled for  
9 this motion is not sufficient for the trier of fact to determine whether the creditors of both the  
10 debtors and non-debtors dealt with the entities as a single economic unit and did not rely on the  
11 separate identities when they extended credit; or whether the affairs of the debtors and non-  
12 debtors were so entangled that the consolidation would benefit all creditors.

13 For example, the trustees allege the ownership structure of all of the Symphony Entities,  
14 within which they include GKPS and HSC, exhibits a “striking unity of interest and common  
15 ownership.” That is not unusual in today’s business world, it is common. To structure several  
16 different businesses with common ownership into one entity is the unusual. Nor is the fact that  
17 GKPS is the sole owner of Symphony III and the sole general partner of HSC either unusual or a  
18 sufficient reason to consolidate. Holding companies are not uncommon, they are quite common,  
19 and unless the substantive factors exist to consolidate, common ownership is nearly irrelevant.

20 The fact that the four individual shareholders of GKPS are also the sole limited partners  
21 of HSC is equally irrelevant to whether this motion should be granted on a summary basis.

22 The trustee’s argument is essentially that the affairs of GKPS and Symphony were  
23 “entangled,” but they do not assert specific facts that would show that GKPS, HSC and  
24 Symphony acted as a single consolidated entity, other than a reference to Mr. Perry’s testimony  
25 in a FRBP 2004 examination, in which he purportedly testified that there “...wasn’t any  
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1 separation.” This was in response to a question regarding whether or not HSC had a separate  
2 office.

3       There is also no reason to believe that substantive consolidation of the GKPS estate with  
4 the Symphony estate, and the further consolidation of HSC and Symphony III would benefit the  
5 creditors of either estate. Without an evidentiary hearing that will take several days (and involve  
6 the same evidence as the adversary cases) there is nothing from which the Court could conclude  
7 that the distribution would increase if the estates were to be consolidated, so it is impossible to  
8 determine, until the adversary cases are tried whether or not the creditors of either estate will be  
9 better or worse off with or without consolidation.

10       Even worse, the trustees seek to drag two non-debtor entities into bankruptcy using the  
11 procedure of substantive consolidation *nunc pro tunc*. Those non-debtor entities are Symphony  
12 III, Inc. and Hospital and Surgical Center Management Services, LP (“HSC”). Again, the  
13 trustees have made no attempt to actually prove that dragging those two non-debtor entities into  
14 bankruptcy will benefit the creditors of either of those entities, the creditors of the Symphony  
15 estate, or the creditors of the GKPS estate. The trustees make vague allegations concerning  
16 those entities, but provide no real proof that those entities acted as part of a single consolidated  
17 entity with GKPS and Symphony. Moreover, the trustees present no proof of the assets of those  
18 non-debtor entities, the claims against those non-debtor entities, or of how consolidation will  
19 benefit the creditors of any entity.

20       Without completing the discovery in the adversary proceedings, the trustees apparently  
21 do not have sufficient evidence to prove that the creditors of the existing estates will benefit as a  
22 result of the proposed consolidation. The purpose of the motion is to obtain a litigation  
23 advantage in the two pending adversary proceedings commenced by the trustees against WNB  
24 and other defendants (Adversary Proceedings Nos. 06-03215-tmb and 06-03216-tmb—the  
25 “Adversary Proceedings”). In the Adversary Proceedings, the trustees each assert virtually  
26 identical multiple claims against Perry and Kale based primarily on alter-ego and fraudulent

1 conveyance theories as well as preference and fraudulent conveyance claims, and against  
2 Western National Bank.

3 The trustees' alter-ego and fraudulent conveyance claims are based upon alleged facts  
4 similar to the alleged grounds for substantive consolidation asserted in the present motion. The  
5 defendants in the Adversary Proceeding have requested a jury trial of the facts alleged by the  
6 trustees. This motion, if it is granted, would permit the trustees to use substantive consolidation  
7 to avoid litigating the common factual issues in a jury trial after discovery has been completed.  
8 The trustees should not be permitted to "discount" or "dilute" discovery and avoid submitting  
9 disputed facts to a jury.

10 Other courts have encountered bankruptcy trustees attempting to use this same trial and  
11 discovery avoidance strategy. The response from those courts has been critical. The courts have  
12 justifiably ruled that trustees, having commenced litigation in the form of adversary proceedings,  
13 should see those adversary proceedings through to the end using the normal discovery and trial  
14 process. Such courts have held that trustees should not be allowed to "opt out" of the normal  
15 adversary proceeding process, once begun, and achieve their litigation goals through the  
16 alternative of substantive consolidation before trial. *See, e.g. Wells Fargo Bank v. Sommers (In*  
17 *re AMCO Insurance)*, 444 F.3d 690, 697 n. 5 (5<sup>th</sup> Cir. 2006):

18 "it appears on the record before us that other remedies, such as the doctrines of alter-ego  
19 and fraudulent conveyance, may have been available, and appropriate under the  
20 circumstances, and the bankruptcy court should duly make such considerations.  
21 Substantive consolidation should not be used as a 'free pass' to spare [d]ebtors or any  
22 other group from proving challenges, like fraudulent transfer claims, that are liberally  
23 brandished to scare yet are hard to show. *Owens Corning*, 419 F.3d at 215. As the  
24 Owens Corning court noted, if the objectors to substantive consolidation were as  
25 vulnerable to the fraudulent transfer challenges as alleged, 'then the game should be  
26 played to the finish in that arena.'"

23 Defendants Perry and Kale would be substantially prejudiced by an order consolidating  
24 these cases, and adding non-debtors without the benefit of a full evidentiary hearing. Without  
25 safeguards, the trustees would clearly seek to use such an order to avoid having to prove their  
26 allegations to a jury.

1 Perry and Kale have denied that HSC has denied receiving any wrongful transfers from  
2 Symphony and has asserted the good faith defenses available to remote transferees under 11  
3 U.S.C. § 550(b). Since the trustee's have not come forward with any evidence prove that  
4 consolidation would benefit creditors other Western National Bank, or that the affairs of GKPS  
5 are so entangled with the Symphony Entities, and that the affairs of all of those separate entities  
6 are so entangle with HSC to make all of these entities a single economic unit, Perry and Kale  
7 respectfully request this Court to deny this pending motion for substantive consolidation and to  
8 allow the trustee to assert substantive consolidation as a part of the relief they are requesting in  
9 the Adversary Proceedings. That would defer the ruling on substantive consolidation until after  
10 the jury trial. If the jury finds that sufficient facts exist for a judgment against Perry and Kale on  
11 the trustee's claims for relief, then those findings can serve as a basis for substantive  
12 consolidation after a full hearing. If this Court grants the trustee's motion, Perry and Kale  
13 respectfully request the Court to enter a consolidation order that expressly preserves all defenses  
14 that Perry and Kale would have if there is no consolidation prior to the conclusion of a jury trial.

15 The trustees rely primarily on the Ninth Circuit's opinion in *Bonham* to support their  
16 motion. Perry and Kale agree with the analysis of Western National Bank that reliance on  
17 *Bonham* is misplaced and that *Bonham* does not create a rule authorizing substantive  
18 consolidation whenever trustees might gain a litigation advantage from consolidation. *Bonham's*  
19 holding is much more limited. *Bonham* involved an alleged Ponzi scheme that had already been  
20 proved, and the need to create fraudulent conveyance and preference actions where no such  
21 actions existed absent consolidation. Here, the trustees already have pending fraudulent  
22 conveyance and preference claims against Perry and Kale and others. They do not need  
23 consolidation to create such claims.

24 No Ponzi scheme is alleged, let alone proved. Again, Perry and Kale agree with the  
25 analysis put forward by Western National Bank's counsel that the trustees simply want to make  
26 their existing litigation claims easier to prosecute by gaining significant rulings in what they

1 perceive to be a favorable forum, in the context of an expedited motion procedure without  
 2 discovery. Nothing in Bonham justifies using the substantive consolidation procedure to obtain  
 3 such a result.

4 In fact, the Ninth Circuit in *Bonham* expressly recognized that resolving a substantive  
 5 consolidation request by means of an adversary proceeding is on of the proper procedural  
 6 alternatives available to bankruptcy courts. *Bonham*, 229 F.3d at 765 n. 9. Once that burden of  
 7 proof shifts, “the court may order consolidation only if it determines that the demonstrated  
 8 benefits of consolidation ‘heavily’ outweigh the harm.” *Id.* at 766. The Ninth Circuit, in  
 9 *Bonham*, also stated that “[r]esort to consolidation ...should not be Pavlovian...but as almost  
 10 every other court has noted, should be used ‘sparingly.’” *Id.* at 767. Here, the trustees have not  
 11 demonstrated the benefits of consolidation. All trustees have presented is argument, along with  
 12 minimal evidence of nothing at all unusual in the context of closely-held start-up companies  
 13 where some of the participants are not businessmen.

#### 14 CONCLUSION

15 Perry and Kale ask the Court to deny the present motion. If the trustees are insistent upon  
 16 substantive consolidation, then Perry and Kale suggest that substantive consolidation be tried  
 17 along with the Adversary Proceedings.

18  
 19 DATED: Monday, August 14, 2006.

20 Respectfully submitted,

21  
 22 /s/ J. Stephen Werts  
 23 J. STEPHEN WERTS, OSB No. 74337  
 24 Of Attorneys for Kenneth Perry and Roberta Kale  
 25  
 26

**CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing **KENNETH W. PERRY'S AND ROBERTA A. KALE'S OPPOSITION TO MOTION FOR SUBSTANTIVE CONSOLIDATION** on the following parties:

☒ by **MAILING** a full, true and correct copy thereof in a sealed, postage-paid envelope, addressed as shown below, and deposited with the U.S. Postal Service at Portland, Oregon, on the date set forth below.

Craig P. Bronstein 400 N. Tustin Ave., #120 Santa Ana, CA 92705-3815	David P. Canas 315 Deaderick St., #1800 Nashville, TN 37238
Timothy J. Conway 888 SW 5 <sup>th</sup> Ave., #1600 Portland, OR 97204	Joseph A. Field 610 SW Alder #910 Portland, OR 97205
Craig V. Gabbert 315 Deaderick St., #1800 Nashville, TN 37238	Albert N. Kennedy 888 SW 5 <sup>th</sup> Ave., #1600 Portland, OR 97204
Mark M Le Coz 1211 SW 5 <sup>th</sup> Ave., #1600-1800 Portland, OR 97204	Gene Mechanic 621 SW Morrison St., #1450 Portland, OR 97205
Douglas R. Pahl 1120 NW Couch St., 10 <sup>th</sup> Fl. Portland, OR 97209-4128	Barbara Provo 10400 SE Cook Ct. #143 Portland, OR 97222-1585
Daniel H. Rosenhouse 1515 SW 5 <sup>th</sup> #410 Portland, OR 97201	Brad Summers 101 SW Main #1100 Portland, OR 97204

☐ by causing a full, true and correct copy thereof to be **HAND-DELIVERED** to the party, at the address listed below on the date set forth below;

☐ by **FAXING** a full, true and correct copy thereof to the party, at the fax number shown below, which is the last-known fax number for the party's office, on the date set forth below.

☒ **ELECTRONICALLY** a full, true and correct copy thereof to the party, at the email address shown below, which is the last-known fax number for the party's office, on the date set forth below:

Kelley A. Blaine

[Porirs.bk.e-mail@irscounsel.treas.gov](mailto:Porirs.bk.e-mail@irscounsel.treas.gov), [Kelley.a.blaine@irscounsel.treas.gov](mailto:Kelley.a.blaine@irscounsel.treas.gov)

Barry P. Caplain  
[mbodenheimer@sussmanshank.com](mailto:mbodenheimer@sussmanshank.com) [barry@sussmanshank.com](mailto:barry@sussmanshank.com)

Rodolfo A. Camacho  
[rudymacholaw.com](mailto:rudymacholaw.com) [or16@ecfbis.com](mailto:or16@ecfbis.com)

David A. Foraker  
[David.foraker@greenemarkley.com](mailto:David.foraker@greenemarkley.com) [joyce.chartrand@greenemarkley.com](mailto:joyce.chartrand@greenemarkley.com)

Matthew A. Goldberg  
[mgoldbeg@prestongates.com](mailto:mgoldbeg@prestongates.com) [jshelton@prestongates.com](mailto:jshelton@prestongates.com)

Sandford R. Landress  
[Sanford.landress@greenemarkley.com](mailto:Sanford.landress@greenemarkley.com) [nancy.read@greenemarkley.com](mailto:nancy.read@greenemarkley.com)

Amy E. Mitchell  
[mitchelltrustee@comcast.net](mailto:mitchelltrustee@comcast.net)

US Trustee  
Portland USTPRegion [18.PL.ECF@usdoj.gov](mailto:18.PL.ECF@usdoj.gov)

Robert J. Vanden Bos  
[vbcservice@msn.com](mailto:vbcservice@msn.com)

Laura J. Walker  
[Lwalker@chbh.com](mailto:Lwalker@chbh.com) [sormsby@chbh.com](mailto:sormsby@chbh.com)

DATED Monday, August 14, 2006.

/s/ J. Stephen Werts  
J. STEPHEN WERTS, OSB No. 74337  
Of Attorneys for Kenneth Perry and Roberta Kale